144-28

144-28

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 146.

OTTO HEINZE AND FRANCIS GROSS, PLAINTIFFS IN ERROR,

vs.

CHARLES E. MILLER AND DANIEL G. ROLLINS, EXECUTORS OF CHESTER A. ARTHUR, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 2, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 146.

OTTO HEINZE AND FRANCIS GROSS, PLAINTIFFS IN ERROR,

vs.

CHARLES E. MILLER AND DANIEL G. ROLLINS, EXECUTORS OF CHESTER A. ARTHUR, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Summons	3	2
Certiorari	4	2
Notice as to bill of particulars	6	3
Bill of particulars	7	3
Declaration	9	4
Plea	11	6
Order substituting executors as parties defendant	13	6
Minutes of trial	15	7
Judgment	17	7
Bill of exceptions	19	8
Plaintiffs' case	19	8
Protest, February 5, 1872	20	8
Defendants' motion for verdict	20	8
Assignment of errors	22	9
Joinder in error	24	10
Bond	26	11
Citation	28	12
Proof of service of citation	29	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1891.

1 UNITED STATES OF AMERICA, *ss:*

Seal of U. S. Circuit Court, South. Dist. New York.

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Otto Heinze and Francis Gross, plaintiffs, and Charles E. Miller and Daniel G. Rollins, executors, &c., defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the twelfth day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
Circuit Judge.

2 [Endorsed:] 3358. U. S. Supreme Court. Otto Heinze *et al.*, plaintiffs in error, against Charles E. Miller *et al.*, ex'rs, &c., defendants in error. Writ of error. Service of a copy of the within writ of error is hereby admitted this 12 day of September, 1888. Stephen A. Walker, attorney for def'ts in error. U. S. circuit court. Filed Sep. 12, 1888. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to twenty-seven, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Otto Heinze and Francis Gross, plaintiffs in error, against Charles

E. Miller and Daniel G. Rollins, executors, etc., defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of September, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

OTTO HEINZE and FRANCIS GRÖSS, Plaintiffs,
vs.
CHESTER A. ARTHUR, Defendant.
} No. 1. Summons for Relief.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of the city of New York, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 29 Nassau street, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated New York, July 15, 1874.

H. J. BEGLY,
Plaintiffs' Attorney.

4 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Chester A. Arthur, defendant, by Otto Heinze *et al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 26th day of October, 1874, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

[L. S.]

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 16th day of October, in the year one thousand eight hundred and seventy-four.

KENNETH G. WHITE, *Clerk.*

GEORGE BLISS,
United States Attorney, Attorney for Defendant.

5 [Endorsed:] U. S. circuit court. Chester A. Arthur *vs.* O. Heinze *et al.* Copy certiorari. George Bliss, defendant's attorney. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Oct. 16th, 1874. Yours, George Bliss, defendant's attorney. To —— ——, plaintiffs' attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, Oct. 16, 1874. (S'g'd) H. J. Begly, plaintiffs' attorney.

6 Circuit Court of the United States for the Southern District of New York.

O. HEINZE *et al.*
vs.
CHESTER A. ARTHUR. } No. 1.

NEW YORK, *August 29th*, 1874.

George Bliss, Esq., defendant's attorney:

SIR: Please take notice that the annexed is a bill of particulars of the plaintiffs' demand in this case, and for the recovery of which this action is brought, by reason of money illegally exacted of the plaintiffs by the defendant as collector of the port of New York on merchandize imported in the vessels and at the dates named in the annexed schedule.

Truly yours,

H. J. BEGLY,
Plaintiffs' Attorney.

7 *Bill of Particulars.*

Name of importer: Heinze, Gross & Co.
Description of merchandise: Cotton & silk gloves.
Places whence imported: Liverpool.
Name of vessel: City of Brussels.
Invoice: Dec. 23, 1873.
Entry at custom-house: Jan'y 14, 1874.
Payment of duties: Jan'y 14, 1874.
Filing protest: Feb. 6, 1874.
Appeal to Secretary of the Treasury: Feb. 24, 1874.
Decision on appeal: April 30, 1874.
Am't of excess claimed: 174.99.

8 [Endorsed:] U. S. circuit court, southern district of New York. O. Heinze *et al.* against C. A. Arthur. No. 1. Bill of particulars of plaintiffs' demand. New York, ——, 188–. To George Bliss, Esquire, defendant's attorney. H. J. Begly, plaintiffs' attorney, 29 Nassau street.

9 THE UNITED STATES OF AMERICA.

Circuit Court of the United States for the Southern District of New York, in the Second Circuit, of the Nineteenth Day of April, in the Year of Our Lord One Thousand Eight Hundred and Seventy-six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

(No. 1.)

Otto Heinze and Francis Gross, plaintiffs in this suit, come here into court, and by H. J. Begly, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 15th day of July, 1874, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against Chester A. Arthur, the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the same day; that the defendant afterwards, by George Bliss, Esquire, his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards and on the 26th day of October, in the year of our Lord one thousand eight hundred and seventy-four, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided, and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court according to the course and practice of this court; which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action against the defendant be continued in this court.

And the said plaintiffs accordingly, by H. J. Begly, their attorney, complain of the defendant in this suit being in custody, &c., of a plea of trespass on the case for promises, for that whereas the said defendant heretofore, to wit, on the day of the date of this declaration, to wit, at the city of New York, in the district aforesaid, was indebted to the said plaintiffs in the sum of one hundred and seventy-four and $\frac{99}{100}$ dollars, lawful money of the United States of America, for duties on certain merchandise, to wit, gloves, imported into and entered at the collection district of the United States for the city of New York on or about the following dates, to wit, Jan'y 14, in the year one thousand eight hundred and seventy-four, in the following ships or vessels, to wit, City of Brussels, from Liverpool, unlawfully demanded, exacted, and received, at the city of New York aforesaid, in the district aforesaid, by the said defendant, then collector of the customs for the district aforesaid, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest in writing in due form of law.

And being so indebted he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money above mentioned when he, the said defendant, should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of one thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request of the said defendant, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when he, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant (although often afterwards requested so to do) has not as yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiffs of one thousand dollars, and therefore the said plaintiffs bring suit, &c.

H. J. BEGLY,
Attorney for the Plaintiffs.

10 [Endorsed:] U. S. circuit court. O. Heinze *et al. vs.* C. A. Arthur. No. 1. Declaration. H. J. Begly, No. 29 Nassau street, attorney for plaintiffs. To George Bliss, Esq., def't's att'y. Sir: Please to take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the Book of Common Rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of a copy thereof and notice of said rule on his attorney or judgment, &c. New York, April 19th, 1876. H. J. Begly, attorney for plaintiffs, 29 Nassau street. Due service of a copy of within declaration and above notice is hereby admitted this — day of ——, 186–. —— ——, def't's att'y.

11 United States Circuit Court, Southern District of New York.

CHESTER A. ARTHUR *ads.* OTTO HEINZE & *al.* } Plea.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, etc.

GEORGE BLISS,
Defendant's Attorney.

To H. J. Begly, Esq., plaintiffs' attorney.

12 [Endorsed:] U. S. circuit court. Chester A. Arthur *ads.* O. Heinze *et al. against Chester A. Arthur.* Plea. George Bliss, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, April 27, 1876. (S'g'd) H. J. Begly, pl'ffs' att'y. You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, April 27, 1876. Yours, etc., George Bliss, defendant's attorney. To —— ——, plaintiffs' attorney.

13 United States Circuit Court, Southern District of New York.

JULIUS C. COLEMAN & Ano., Pl'ffs, *vs.* CHESTER A. ARTHUR, Defendant. } U. S. 1773.

OTTO HEINZE & Ano. *vs.* THE SAME. } 3358.

And 323 other suits against the same defendant.

At a stated term of the circuit court of the United States for the southern district of New York held at the United States court-rooms, in the post-office building, in the city of New York, the 10 day of January, 1887.

Present: Hon. William J. Wallace, circuit judge.

JULIUS C. COLEMAN & Ano. *vs.* CHESTER A. ARTHUR, &c., &c., &c. } U. S. 1773.

14 On reading and filing the annexed affidavit of MacGrane Coxe, duly sworn to the 10th day of January, 1887, and the annexed exemplified copy of letters testamentary granted by

the court of common pleas for the city and county of New York to Charles E. Miller and Daniel G. Rollins on the 4th day of December, 1886, on motion of Stephen A. Walker, United States attorney and attorney for said Chester A. Arthur, it is ordered that the said Charles E. Miller and Daniel G. Rollins, executors of the last will and testament of said Chester A. Arthur, deceased, be, and they are hereby, substituted as parties defendant in each and every of the above-entitled actions in the place of said Chester A. Arthur, deceased, and that said actions stand revived and continued as against them.

(Signed) WM. J. WALLACE.

A copy.

JOHN A. SHIELDS, *Clerk.*

15 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the nineteenth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable E. Henry Lacombe, circuit judge.

OTTO HEINZE *et al.*
vs.
CHARLES E. MILLER *et al.* } 3358.

Now come the plaintiffs, by Stephen G. Clarke, Esq., their counsel, and moves the trial of this cause; also comes the defendants, by W. Wickham Smith, Esq., ass't U. S. att'y, their attorney. Thereupon a jury is empanelled, and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel the jury, by direction of the court, find a verdict for the defendants.

It is ordered that plaintiffs have a stay of proceedings on said verdict for sixty days in which to prepare and serve a cave.,
16 with leave to turn the same into a bill of exceptions.

An extract from the minutes.

[Seal U. S. Circuit Court, S. D. of N. Y.]

(S'g'd) JOHN A. SHIELDS, *Clerk.*

17 United States Circuit Court, Southern District of New York.

OTTO HEINZE *et al.*
vs.
CHARLES E. MILLER *et als.*, etc. } Judgment. Sept. 7th, 1888.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury at a circuit court of the April term, 1888, and the issues having been tried, and a verdict for the defendants having been duly rendered on the nineteenth day of June, 1888, and their costs having been adjusted at $48.85—

Now, on motion of Stephen A. Walker, United States attorney, for defendant-,

It is adjudged that the defendants have judgment against the plaintiffs upon the issues in this action, and that they recover the sum of $48.85, their taxed costs, and have execution therefor.

Judgment signed this seventh day of September, 1888.

—— ——, *Clerk.*

18 [Endorsed:] United States circuit court. Otto Heinze *et al. vs.* Chas. E. Miller *et al.*, etc. Judgment-roll. Stephen A. Walker, United States attorney, attorney for defendant. Filed ——, 188–. Costs, $48.85. (File-mark:) U. S. circuit court. Filed Sept. 7, 1888. John A. Shields, clerk.

19 U. S. Circuit Court, Southern District of New York.

Otto Heinze and Francis Gross
vs.
Charles E. Miller *et al.*, Ex'rs of Chester A. Arthur. } Bill of Exceptions.

Be it remembered that afterwards and on the 19th day of June, 1888, at a stated term of this court, held in the city of New York, the issues in this cause came on for trial before the Honorable E. Henry Lacombe, a judge of this court, and a jury duly empanneled to try the issues therein.

Plaintiffs' counsel, in opening his case, announced to the court and jury that they claimed that the goods involved in the suit were dutiable at 35% either as "gloves made on frames," under sect. 22 of the act of March 3rd, 1861, and the 13th section of the act of July 14th, 1862, or as "manufacturers of cotton not otherwise provided for," under section 6 of the act of June 30th, 1864.

The plaintiffs, to maintain the issues on their part, introduced evidence tending to show that on January 13th, 1874, they had imported gloves made on frames, composed of cotton and a slight admixture of silk, from 10 to 25% in value, and that the collector, Chester A. Arthur, had assessed thereon a duty of 60% ad valorem, which plaintiffs had paid.

20 They then offered in evidence a protest as follows:

"New York, 5 *Feb'y*, 1872.

Hon. —— Arthur, collect- of port — New York.

Dear Sir: On an importation of the undersigned firm, per steamer City of Brussels from Liverpool, duty paid January 14, 1874, containing partly cotton gloves mixed with silk, the appraisers of this port have levied a duty of 60% ad valorem, although the article is only liable to a duty of 35% less 10%, being composed of cotton & silk, cotton chief part, the duty of 60% being only legal where silk is the chief part.

We have paid the excess in order to get possession of the goods,

but shall hold you and the Government responsible for the return of the same.

Very respectfully, your obedient servants,

HEINZE, GROSS & CO.,
LUCAS MUR, *Att'y.*"

Entry liquidated 30 January, 1874.

All other requirements as to appeal and suit *had* been complied with, thereupon the plaintiffs rested, and counsel for defendants moved the court to direct a verdict for the defendants on the ground that the protest was totally insufficient, in that it did not distinctly and specifically point out to the collector the ground of plaintiffs' objection to his classification; that it contained no allegation that the goods in question were made on frames, and that, while there were in force at the time the protest was served many provisions of law
(including those alluded to by plaintiffs' counsel in his open-
21 ing, as well as others) providing for a duty of 35%, which might be applicable to plaintiffs' goods, there was nothing in the protest to show which one of them was relied on by the importer-; which motion the court granted, and counsel for the plaintiffs then and there duly excepted, and the exception was allowed by the court.

Whereupon, under the direction of the court, the jury found a verdict for the defendants.

And inasmuch as the foregoing matters of law and fact and the several exceptions taken and made do not appear upon the records of the trial, therefore, upon the prayer of the plaintiffs, by their counsel, the said judge has signed the foregoing as and for the bill of exceptions in this case as of the 19th day of June, 1888.

E. HENRY LACOMBE.

We consent that the foregoing shall be signed as and for the bill of exceptions herein.

New York, July 19, 1888.

H. J. BEGLEY, *Att'y for Pl'ffs.*
STEPHEN A. WALKER,
U. S. Att'y, Att'y for Def't-.

(Endorsed:) U. S. circuit court, southern district of New York. Otto Heinze *et al. vs.* Charles E. Miller *et al.*, ex'rs. Bill of exceptions. H. J. Begley, attorney for plaintiffs, 31 Nassau St., N. Y. U. S. circuit court. Filed July 24, 1888. John A. Shields, clerk.

22 Supreme Court of the United States.

OTTO HEINZE and FRANCIS GROSS, Plaintiffs in Error,
vs.
CHARLES E. MILLER and DANIEL G. ROLLINS, Executors, Etc., Defendant- in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the capitol, in Wash-

ington, come the said plaintiffs in error, by Stephen G. Clarke, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit: That by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

23 [Endorsed:] United States Supreme Court. Otto Heinze *et al.*, plaintiffs in error, *vs.* Charles E. Miller *et al.*, defendants in error. Assignment of error. Stephen G. Clarke, attorney for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 12th day of September, 1888. (S'g'd) Stephen A. Walker, attorney for defendants in error. (File-mark.) U. S. circuit court. Filed Sept. 12, 1888. John A. Shields, clerk.

24 Supreme Court of the United States.

Otto Heinze & Francis Gross, Plaintiffs in Error, *vs.* Charles E. Miller & Daniel G. Rollins, Executors, &c., Defendants in Error.	Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant- in error, by Stephen A. Walker, their attorney, come here into court and say that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And they pray that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

(S'g'd) STEPHEN A. WALKER,
Attorney for Defendants in Error.

25 [Endorsed:] 3358. United States Supreme Court. Otto Heinze & ano., plaintiff in error, *vs.* Charles E. Miller & ano., defendants in error. Joinder in error. Stephen A. Walker, attorney for defendants in error. Due service of a copy of the within joinder in error is hereby admitted this 12 day of Sept., 1888. (S'g'd) Stephen G. Clarke, attorney for plaintiffs in error. Stephen G. Clarke, attorney for plaintiff- in error. (File-mark:) U. S. circuit court. Filed Sept. 12, 1888. John A. Shields, clerk.

26 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

OTTO HEINZE and FRANCIS GROSS *vs.* CHARLES E. MILLER and DANIEL G. ROLLINS, Executors, &c. } Bond for Damages and Costs.

Know all men by these presents that I, Hugh J. Begly, am held and firmly bound unto the above-named Charles E. Miller and Daniel G. Rollins, ex'rs, in the sum of two hundred and fifty ($250) dollars, to be paid to the said Chas. E. Miller & Daniel G. Rollins; for the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators, by these presents.

Sealed with my seal and dated the seventh day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-named Otto Heinze & Francis Gross have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Heinze and Gross shall prosecute said writ of error to effect and answer all costs if they fail to make their assignments of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd) HUGH J. BEGLY.

Sealed and delivered and taken and acknowledged this 7th day of September, 1888, before me—

(S'g'd) GEORGE F. HAYWOOD,
[NOTARIAL SEAL.] *Notary Public, Kings Co., N. Y.*

Cert. filed in N. Y. Co.

27 [Endorsed:] U. S. circuit court, southern district of New York. Otto Heinze and Francis Gross *vs.* Charles E. Miller and Daniel G. Rollins, executors, etc. Bond for costs on writ of error. Approved as to form, amount, and sufficiency of the sureties. Sept. 12th, 1888. (S'g'd) E. Henry Lacombe, circuit judge. (Filemark:) U. S. circuit court. Filed Sept. 12, 1888. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Hugh J. Begly, being duly sworn, deposes and says that he is a freeholder within the State of New York; that he is worth the sum of five hundred dollars over and above his just debts and liabilities.

(S'g'd) HUGH J. BEGLY.

Sworn to this 7th day of September, A. D. 1888, before me—

(S'g'd) GEO. F. HAYWOOD,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

28 UNITED STATES OF AMERICA, *ss:*

To Charles E. Miller and Daniel G. Rollins, executors, &c., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Otto Heinze and Francis Gross are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 12th, 1888.

E. HENRY LACOMBE,
Circuit Judge.

[Endorsed:] 3358. U. S. Supreme Court. Otto Heinze *et al.*, plaintiffs in error, against Charles E. Miller *et al.*, ex'rs, &c., defendants in error. Citation. Stephen G. Clarke, attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 12 day of Sept., 1888. Stephen A. Walker, attorney for defendants in error. U. S. circuit court. Filed Sep. 12, 1888. John A. Shields, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 146. Otto Heinze and Francis Gross, plaintiffs in error, *vs.* Charles E. Miller and Daniel G. Rollins, executors of Chester A. Arthur, deceased, late collector of the port of New York. Filed October 2, 1888.

Office Supreme Court, U.S.
FILED.
NOV 28 1891
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

No. 148.

OTTO HEINZE ET AL.

vs.

CHAS. E. MILLER ET AL.

PLAINTIFFS' BRIEF.

EDWIN B. SMITH,
STEPHEN G. CLARKE,
Of Counsel.

STANLEY, CLARKE & SMITH,
120 Broadway, New York,
Attorneys.

C. G. BURGOYNE'S PRINTING BUREAU, NEW YORK.

SUPREME COURT OF THE UNITED STATES.

OTTO HEINZE and FRANCIS GROSS, Plaintiffs in Error, vs. CHARLES E. MILLER and DANIEL G. ROLLINS, Executors of Chester A. Arthur, deceased, late Collector of the Port of New York, Defendants in Error.	October Term, 1891. No. 146.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

Statement.

The plaintiffs in January 1874 imported gloves made on frames composed of cotton with a slight admixture of silk, upon which the defendant assessed and the plaintiffs paid a duty of sixty per cent ad valorem.

In due time the plaintiffs filed a protest, the substantial part of which is as follows:

"On an importation of the undersigned firm, per steamer City of Brussels, from Liverpool, duty paid January 14, 1874, containing partly cotton gloves mixed with silk, the appraisers of this port have levied a duty of 60% *ad valorem*, although the article is only

liable to a duty of 35% less 10%, being composed of cotton & silk, cotton chief part, the duty of 60% being only legal where silk is the chief part." (Record, folio 20.)

The sole question presented by the record is the sufficiency of this protest. The contention of the plaintiffs being that the Gloves were dutiable at 35% *ad valorem* under Section 22 of the Act of March 3, 1861 and Section 13 of the Act of July 14, 1862, or as manufactures of cotton under Section 6 of the Act of June 30, 1864.

The Court directed a verdict for the defendant on the ground that the protest was insufficient in that it did not distinctly and specifically point out to the collector the ground of plaintiffs' objection to his classification.

Errors Assigned.

That the Court held the protest set forth in the record to be insufficient.

That the Court erred in directing a verdict for the defendant.

POINTS.

The sole question presented is as to the sufficiency of the protest, it being practically conceded that the assessment of duty by the Collector was erroneous.

In fact the dutiable category of these goods and their proper classification was passed upon by this Court in the case of Arthur vs. Unkart, 96 U. S., 118.

The Statute then in force provided that the decision of the Collector as to duties should be final, unless the importer should give notice in writing to the Collector "setting forth therein distinctly and specifically the grounds of his objections thereto."

Act of June 30, 1864, C. 171, Sec. 14 (13 Stats. at Large, 215); R. S. Sec. 2931.

The ground of the defendant's objection and of the decision of the Court was the failure of the plaintiffs, as was claimed and held, to point out to the Collector the particular line of the Statutes under which the goods were dutiable.

Under the Statute this was error. All that the Statute required is that the importer should point out to the Collector distinctly and specifically *the grounds of his dissatisfaction* with the duty assessed. The Collector assessed 60% duty upon these goods as manufactures of silk. The importer protested against this, saying that the goods were not silk but were cotton and silk of which cotton was the chief part and that the 60% duty was only legal and applicable where silk was the chief part.

Could anything be more specific as to the objection to the duty complained of?

If that contention was a correct contention both in law and in fact then the Collector had all the notice the law intended, or that he required, to know that his assessment was an illegal one.

The proposed assessment being illegal was it not the Collector's duty to properly assess duties upon the goods?

It is contended that the protest ought to have pointed out the correct rate of duty. We submit that the statute requires nothing of the kind.

This case is entirely different from those where the importer has gone beyond the statute and claimed a particular provision as applicable to his goods; such claim might mislead the collector. Here, however, he has pointed out correctly the error, and on correct grounds, and claimed the correct rate of duty, without pointing out to the collector the particular line of the statute under which 35 % might be assessed.

There was nothing here to mislead the collector and every requirement of the statute as to protest was met. The gloves were not dutiable as silk because silk was not chief value and that rate only applied where silk was.

This section, as to protests (13 Stats., 214-5; R. S., § 2931) *only* attributes finality to "the *decision* of the collector," etc., "as to the RATE and *amount* of duties," etc.; the latter being usually a mathematical computation from the former.

His determination as to "rate and amount" is conclusive, unless the owner, etc., give the statutory notice

"if dissatisfied with his *decision*, setting forth therein, distinctly and specifically the grounds of his objection THERETO," etc. (13 Stats. 215 top; R. S. § 2931.)

It is absolutely certain that 'decision' in its second use in this section means precisely what it is declared to mean when first used; *i. e.* "as to *rate* and *amount*."

It is *thereto*—to that decision as to rate, etc.—that the objections must be distinct and specific.

What we had to tell him, and did most distinctly tell him, was that we were, and *why* we were, dissatisfied as to the *rate* his decision assigned.

We were under no obligation to give this official instructions as to what he should do; only our reasons for being dissatified with what he had done.

The erroneous rate was assigned because of an error of *fact*. When we had corrected this mistake of *fact*, the collector should perceive for himself what the *law* required of him upon the actual conditions.

Thus, in Belcher v. Lawrason, 21 How. 251, the collector exacted a penalty of 20% upon the value of the goods; the importers protested and sued to recover that sum, so paid. The Court held the exaction illegal; but added that the importer was liable to a penalty of fifty per cent of the regular duty: and gave judgment to the importer for the *difference*. It sustained the protest made, instead of defeating it because it did not tell the collector what he should have exacted.

The collector's action of which we complained, and our difference with him, arose out of the question of fact as to the true relation of value which the constituent materials of our importations bore to each other. When this *fact* is shown to have been erroneously assumed by him, and truly stated by us, the collector was bound to know the *law*, and to correct his "decision as to the *rate*" conformably thereto.

The issue between us was a conflict of rates, dependent upon *composition*—not upon enumeration or designation. What the articles were, as to use, etc., was evident at a glance; but which component possessed the chief value (the vital question) was less easily ascertainable; and it was precisely here that the collector erred. If silk had been chief value, the *rate* assigned by him would have been correct; otherwise, it was not:—and cotton being the chief value, the *rate* claimed by us was right. We were entitled to that very rate, because of the very reason assigned by us.

Every contract, notice, etc., is construed with reference to the circumstances out of which it originates; *e. g.*,this protest with reference to the fact in controversy between us and the collector.

Vaccari vs. Maxwell, 3 Blatc., 374.
Maillard vs. Lawrence, *Ib.*, 381.

Although we did state a perfect ground of dissatisfaction with the collector's decision as to rate, we were beaten in the Court below because we did not suggest a further fact *utterly immaterial* upon the question of rate, and not in debate between us and the Custom-house.

The parties agreed on the indisputable fact, manifest at a glance, that the importations were *gloves*. The collector assessed them as silk gloves. We protested they were not, because cotton was the chief component of these mixed gloves. (Rec. 8.)

Being gloves, of which cotton was actually the constituent of chief value, it was utterly immaterial as to *rate* whether they were made upon frames, or with needles, or otherwise.

To show the error we allege in the judgment of the Court below, suppose the collector to have perceived the truth as to their composition, and to have assessed these goods at the rate at which we were confessedly entitled to enter them;—could we have had any more ground to complain in fact than we should have had at law, if he had so rated them under some name not properly applicable to them? Certainly not; because *rate* is really the all important fact, which alone the law recognizes as issuable.

In Burgess v. Converse, 2 Curt. 220, the protest was that the goods were not "fairly and faithfully examined." The proof was that the examination was of samples unsuited to the purpose because drawn so long before as to have faded. This protest was sustained below, and upon appeal, this Court declaring itself not disposed to exact nice precision, nor to apply any

strict rule of construction to these notices. (18 How. 416–7.)

"It is sufficient if the importer indicates distinctly and definitely *the source of his complaint*, and his design to make *it* the foundation of a claim against the government." Greeley v. Burgess, 18 How. 417.

The reason for requiring such protests is

"in order to apprise the collector of *the nature of the objection*, before it is too late to remove it, or to modify the exaction, and that the proper officers of the treasury may know what they have to meet, in case they decide to exact the duties as estimated," etc.

Davies v. Arthur, 96 U. S. 149.
Arthur v. Dodge, 101 *Id.* 37.
Same v. Morgan, 112 *Id.* 501.
Schell v. Fauche, 138 *Id.* 569.

In ample time for correction, and in order to obtain it, we notified to the customs-officers the nature of our objection—that cotton, and not silk, was chief value; and had the truth of that statement then been ascertained, the rate we then claimed and now claim, would have been exacted.

There was "secure to the government the practical advantage which the statute was designed to secure." (112 U. S. 501.)

To retain 60% duty, upon goods which Congress intended and declared should pay but 35%, will secure to the government an inequitable advantage which the statute was not designed to secure; doing to the plaintiffs a pecuniary injury which is irreparable, and which ordinary commercial prudence or foresight could not anticipate nor prevent; since the cost of the gloves, thus illegally enhanced, precluded any opportunity of disposing of them at a renumerative price.

STEPHEN G. CLARKE,
EDWIN B. SMITH,
Of Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
DEC 8 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

OTTO HEINZE AND ANOTHER, plaintiffs in error,
vs.
CHARLES E. MILLER AND ANOTHER, executors of Chester A. Arthur, deceased, late collector, etc.
No. 146.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

OTTO HEINZE AND ANOTHER, plaintiffs in error.
vs.
CHARLES E. MILLER AND ANOTHER, executors of Chester A. Arthur, deceased, late collector, etc.
No. 146.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This suit arises upon an importation of cotton and silk gloves made by Heinze, Gross & Co., from Liverpool, by the S. S. *City of Brussels*, in January, 1874.

The action was commenced in the superior court of the city of New York, in July of said year, and was immediately transferred to the circuit court of the United States

for the southern district of New York, where, fourteen years later, trial was had before Judge Lacombe and a jury, June 19, 1888.

The amount claimed under the bill of particulars and by the declaration is $174.99, which is the alleged excess of duties paid by the importers upon the gloves in question.

Upon the trial the court directed a verdict for the defendants upon the case made by plaintiffs upon the ground of the insufficiency of the importer's protest.

No question arises in the case except that of the sufficiency of the importer's protest.

I.

POINTS.

It is settled that Congress may fix the conditions upon which merchandise may be imported, and that the Government may determine the conditions and limitations as to suits permitted to be brought against it, or to reach funds which have been turned into its Treasury.

In *Barney* v. *Watson* (92 U. S., 449) Mr. Justice Bradley, in delivering the opinion of the court, gives a brief history of the act of February 26, 1845 (5 Stat., 727), as follows:

> The case of *Elliot* v. *Swartwout* (10 Pet., 137), decided in 1836, affirmed the principle which had been established by previous authorities, that money paid to a collector for duties illegally demanded, if paid under compulsion, in order to get possession of the party's goods, or to prevent their being seized for the duties, may be recovered against the officer in an

> action at common law, provided the payment be made under protest and with full notice of the intent to sue, so that the officer may protect himself by retaining the money in his possession; but that a payment voluntarily made without such protest can not be recovered back. The embarrassments which ensued in consequence of the large amount of duties withheld from the public Treasury by Mr. Swartwout, the defendant in that case, induced the passage of an act in 1839 (5 Stat., 348, sec. 2), which required all duties collected to be paid into the Treasury without regard to claims for overcharge, and deprived the party of an action at law by giving him the specific remedy of an appeal to the Secretary of the Treasury. This was held to be the effect of the act, although not its express terms, as may be seen by a reference to the case of *Cary* v. *Curtis*, reported in 3 Howard, 236. In 1845 the right of action was restored by an act passed to explain the act of 1839.

It may be stated, in the words of Mr. Cushing, acting as counsel for the importer in *Curtis's Administratrix* v. *Fiedler* (2 Black, 472), that:

> Prior to 1845 there was no law requiring the protest to be made in writing, or to specify the objections. The necessity of written protests and specific objections led to the provision in the act of that date.

This enactment of 1845 prohibits suit against the collector unless the "protest was made in writing and signed by the claimant, * * * setting forth distinctly and specifically the grounds of objection" to the payment.

It is to be noted that not only must the objection appear, but the *grounds* of the objection; and that these grounds are not only to be distinctly stated, but they must be *specifically set forth*.

II.

THE PROTEST.

(A) The paper called a protest does not protest against anything.

By this paper the goods are declared to be "an importation * * * containing partly cotton gloves mixed with silk," on which there was exacted "a duty of 60 per cent ad valorem." It is stated that "the article is only liable to a duty of 35 per cent less 10 per cent, being composed of cotton and silk—cotton chief part," and the comment or conclusion is added that "the duty of 60 per cent" is "only legal where silk is the chief part." (Fol. 20.)

It then gives notice that the Government will be held responsible. This comprehends the whole of the protest.

Plaintiffs' claim upon the trial, as announced to the court and jury, was :

> That the goods involved in the suit were dutiable at 35 per cent either as "gloves made on frames," under section 22 of the act of March 3rd, 1861, and the 13th section of the act of July 14th, 1862, or as "manufactures of cotton not otherwise provided for," under section 6 of the act of June 30th, 1864. (Fol. 19).

The evidence tended to show that the importation was "gloves made on frames, composed of cotton and a slight admixture of silk, from 10 to 25 per cent in value," and that a duty of 60 per cent ad valorem was exacted. (Fol. 19.)

Thereupon defendants' counsel moved that the court direct a verdict in their favor, on the ground that the protest was insufficient:

> In that it did not distinctly and specifically point out to the collector the ground of plaintiffs' objection to his classification; that it contained no allegation that the goods in question were made on frames, and that while there were in force at the time the protest was served many provisions of law (including those alluded to by plaintiffs' counsel in his opening as well as others) providing for a duty of 35 per cent, which might be applicable to plaintiffs' goods, there was nothing in the protest to show which one of them was relied on by the importer.

Which motion was granted.

(B) The plaintiffs upon the trial took the responsibility of placing their case upon double grounds, in the statement made by counsel, but suggested but one ground in the evidence. The only ground of objection which the evidence tends to show is one that is nowise included in the protest.

The statement of the claim made to the court and jury was that the goods "were dutiable at 35 per cent, *either as* 'gloves made on frames,' under sect. 22 of the act of March 3rd, 1861, and the 13th section of the act of July 14, 1862, *or as* 'manufactures of cotton not otherwise provided for,' under section 6 of the act of June 30th, 1864."

Whether the so-called protest was sought to be aimed at the section of the act of 1864 referred to is not shown, but it is clear that all of the evidence suggested by the transcript of record related to gloves made on frames.

As no evidence was offered that tended to show that the goods should be classified under the section of the act of 1864, the trial stands as though that act had not been mentioned upon the trial.

Therefore the whole of the trial related to "gloves made on frames;" and to such goods and to such a classification this "protest" made no reference.

The real question before this court is, it is respectfully submitted, is this paper a "protest * * * setting forth distinctly and specifically the grounds of objection," to wit, that the goods were "gloves made on frames" and that they should be classified and charged as such?

The only ground which can be spelled out from the "protest" is that the gloves are cotton mixed with silk, cotton chief part, and only liable to a duty of 35 per cent less 10 per cent; this statement is preceded by the declaration that the appraisers have levied a duty of 60 per cent on the goods, and it is followed by the statement that the duty of 60 per cent is only legal when silk is the chief part.

The trial relates exclusively to another classification of goods, viz, "gloves made on frames;" and the protest is neither distinct nor specific as to such goods.

It can not be asserted with any color of justice that when this "protest" was placed before the collector he was notified distinctly and specifically that the ground of the objection made to the payment of the duties was that the goods consisted of "gloves made on frames" and that they should be appraised and assessed as such.

Only one ground of recovery is put forth in the evidence, and that is as above shown.

If plaintiffs below sought to present two grounds of recovery, leaving the court and jury to choose between them, then, by that procedure, the plaintiffs practically so construed their protest as to declare it illegal.

In fact the statement of two grounds by the counsel in his opening before the jury was either a maneuver that may be subject to criticism or it was an admission that the protest was not specific and distinct.

In *Fisk* v. *Seeberger* (38 Fed. Rep., 718), Judge Blodgett points out how a protest should be framed to save alternative grounds of objection, saying:

> It is suggested on the part of the defendant that they might have been dutiable at 25 per cent, as jet, or imitations of jet. But it makes no difference whether the collector made a mistake or not in regard to classifying them as beads rather than classifying them as jet. The only question is, did he err in not classifying them as material for making or ornamenting hats, bonnets, and hoods? The plaintiffs, if they thought it probable or possible that these goods should have been passed as jet or imitations of jet, could have made their protest in the alternative, that is, if not dutiable as material for hats, bonnets, and hoods, then they were dutiable as jet, or jet ornaments, or imitations of jet, and thereby save the questions by charging the collector with two mistakes, as you may say.

III.

THE TARIFF PROVISIONS.

The enactments relating to silk that might have been referred to are as follows:

By section 16 of the act of March 2, 1861 (12 Stat., 186), it is provided that certain specified silks, and also "other manufactures of silk, or of which silk shall be the component material of chief value, not otherwise provided for," shall be charged 30 per centum ad valorem.

By section 8 of the act of June 30, 1864 (13 Stat., 210), there is charged "on silk vestings, * * * gloves, suspenders * * * 60 per centum ad valorem."

By section 3 of the act of March 3, 1865 (13 Stat., 493), there is charged "on ready-made clothing of silk, or of which silk shall be a component material of chief value," 60 per centum ad valorem.

Which one of these enactments the importers intended to refer to, if to either of them, the collector had no information.

The statutes relating to cotton goods that might have been referred to are as follows:

By section 22, act of March 2, 1861 (12 Stat., 191), there is charged a duty of 30 per cent upon "clothing, ready made, and wearing apparel of every description, of whatever material composed, except wool, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer."

By section 13 of the act of July 14, 1862 (12 Stat., 556, 557), duties of 5 per cent ad valorem, in addition to those theretofore imposed by law, are directed to be levied,

as follows (p. 556): Upon "caps, gloves, leggings, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women, and children, and not otherwise provided for."

And also (p. 557), upon "Manufactures not otherwise provided for composed of mixed materials in part of cotton, silk, wool, or worsted, hemp, jute, or flax;" and also, "manufactures of cotton, linen, silk, or worsted, if embroidered or tamboured, in the loom or otherwise, by machinery or with the needle or other process, not otherwise provided for."

By the act of June 30, 1864 (13 Stat., 209), there is charged "on cotton shirts and drawers, woven or made on frames, and on all cotton hosiery, 35 per centum ad valorem;" and also, "on cotton braids, insertings, lace, trimming, or bobinet, and all other manufactures of cotton not otherwise provided for, 35 per centum ad valorem."

By section 2 of the act of June 6, 1872 (17 Stat., 231), the duty "on all manufactures of cotton, or of which cotton is a component part of chief value," is reduced to 90 per cent of the duties theretofore imposed on such goods.

Although the counsel in opening the case refers to section 6 of the act of June 30, 1864, the reference does not go beyond the lips of the counsel as it is not touched by the protest or the evidence; and although the evidence tends to show that the importation was "gloves made on frames," the protest omits to specify such an article.

If the importers intended to include all of the enactments cited above, their protest is multifarious and not

specific; if they intended to send the collector on a search through the statutes for their ground of objection they did not perform the condition precedent which the act of 1845 prescribes; if they carelessly and inadvertently made a loose and vague protest in which they did not take the trouble to ascertain or set forth any statutory ground distinctly or specifically, they did so at their peril.

IV.

DECISIONS BEARING UPON THE QUESTION.

A.

The act of February 16, 1845 (5 Stat., 727), has been repeatedly considered by the courts, and the clause which provides that no action shall "be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant at or before the time of payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof," has been the subject of frequent judicial examination.

In the case of Mason *vs.* Kane (Taney, C. C., p. 173), Chief Justice Taney gave a careful consideration to the question involved. The protest was general in its terms and did not specify any particular grounds of objection. The court quotes the concluding portion of the act and says (p. 177):

> It is not, therefore, sufficient to object to the payment of any particular duty, or amount of duty, and protest in writing against it; the claimant must do more; he must set forth, in his protest, the grounds

> upon which he objects, *distinctly and specifically;* and these latter words are too emphatic to be regarded as mere surplusage or to be overlooked in the construction of this law. The object of this provision is obvious; in the multitude of collection offices in the United States and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties; and the object of this provision is to prevent a party from taking advantage of such objections when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest.

The court further says, page 179, that the importer—

> Shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice, stating also, at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus appeal from the administrative to the judicial department of the Government. It is a condition precedent, and as it was not performed in this instance the present action can not be maintained even if the duty exacted were not legally due.

In *Norcross* v. *Greeley* (1 Curtis C. C., 114) Mr. Justice Curtis, at page 120, quotes from the act of 1845, and says:

> This act of Congress has required the importer before making the payment to specify, in writing, the grounds of his objection; and it follows that when his appeal comes to be heard by the courts he must be confined to such grounds of objection to the payment as his protest contains. Now these protests

> contain only one ground, namely, that the plaintiffs pay no such commissions, as are added. There is certainly a great want of distinctness in this specification. * * * It does not set forth the grounds of objection to the payment taken at the bar, that commissions are not usually paid in this trade of importing crockery ware from England, nor that there is no usual rate of commission, nor that 2½ per cent is not the usual rate of commission. It has not been attempted to maintain that the payment was illegally executed merely because the plaintiffs paid no commissions. Yet this is the only ground of objection set forth in the protest, and for this reason I must instruct the jury that the action can not be maintained.

In *Swanston* vs. *Morton* (*Id.*, 294) the protest was as follows:

> We hereby protest against paying the additional penalty of twenty per cent, believing the entry and invoice presented by us to be the actual cost of the barrilla.

The same justice here says:

> The protest must declare what is objected to and what are the grounds upon which the objection is rested. I should not permit any ground, not dsitinctly and specifically set forth in the protest, to be relied upon at the trial.

In this case the protest was held to be sufficient, but the rule, as before stated, is not changed.

In *Kreisler* vs. *Morton* (*Id.*, 413) the protest is as follows:

> We hereby protest against paying the additional duty on the within goods, as we consider them fairly invoiced at the time and place of the exportation.

The importation consisted of fruit and raisins imported from Malaga in 1848. The goods were valued as of the time and place of exportation, and the appraisers did not actually see and examine the goods. The court ruled that as these grounds of objection to the payment were not specifically pointed out in the protest they were not open to the plaintiff on trial.

The court, upon a motion for a new trial, says:

> But the protest does not set forth or allude to either of these grounds of objection. It simply says the invoice value is the true value; which, as already stated, is not a valid ground of objection, and certainly is not the ground now relied upon. It has been suggested at the bar that, in some former cases, the same form of protest has been held sufficient to enable the plaintiff to recover after an appraisement. It is quite possible that protests in this form have come before the court in other trials. I have a recollection of one such case; and it may be that objections have been taken at the trial to such protests, and that such objections were held not to be tenable. But that this precise objection has ever been pointed out, I am not aware. It having been pointed out in this case, I have considered it both at the trial and again on this motion. It seems to me to be necessary, under this act of Congress, to set forth in the protest every ground of objection to the payment protested against; and, as a necessary consequence, no ground can be taken at the trial which does not there appear. These protests are commercial documents, usually made in the hurry of business, and entitled to a liberal interpretation. No technical decision should be required, but they must allege, distinctly and specifically, every substantial objection to

> the payment, so that it shall appear that it was in the mind of the party and was brought to the knowledge of the collector.

This case is reviewed (2 Curtis, 239) and the rule is approved and is applied especially to a penalty sought to be recovered back by suit against the collector.

In *Thompson* vs. *Maxwell* (2 Blatchf., 385) the three importations consisted of shawls. The first and second protests were against paying the additional duty and penalty, claiming that the goods were appraised too high, and asking to have amount specified refunded. The third protest was against the payment of a 30 per cent duty charged on the shawls and claiming to enter the same at 25 per cent.

The court (p. 391) refers to the act of 1845, and says:

> These provisions are conditioned to a right of action on the part of the importer, a proper protest in the case being the basis of the action and a fundamental prerequisite to a recovery. The courts exact a strict compliance with these conditions.

The language of Chief Justice Taney, in *Mason* vs. *Kane*, is then quoted with approval, and the court continues:

> We think there is manifest propriety in adhering closely to the provisions of this law. It is intended by Congress to settle all uncertainty as to the manner in which collectors can be made responsible in actions for duties collected under protest, and the motive of its enactment seems palpably to have been to take from parties the power of imposing upon collectors damages and costs by personal suits in respect to their official transactions, unless they were plainly and directly appraised at the time they

> received the duties, what objection the claimart had to the payment. It is most reasonable that a public officer should be put on his guard against a mistake or error in the exercise of his functions prejudicially to another, who is cognizant of the error and intends to hold him responsible for it by an explicit notice from such person to him of his error in fact or in law. He might thus at once correct the wrong without delay or expense to either party. * * * We understand the act of 1845 to be imperative in its character.

Pierson vs. *Lawrence* (*Id.*, 495) approves and illustrates the doctrine laid down in *Thompson* vs. *Maxwell*, and the same rule is further approved in *Focke* vs. *Lawrence* (*Id.*, 508) and *Cornett* vs. *Lawrence* (*Id.*, 512).

In *Fielden* vs. *Lawrence* (3 Blatchf., 120) suit was brought to recover back additional duties amounting to $672 and penalties to $2,264.60. The protest alleges that the iron was subjected to an increased duty as well as a penalty of 20 per cent, and continues: "We hereby protest against the said increased appraisement and against the exaction of the said increased duty and penalty, and in making payment reserve to ourselves" the right to sue.

Upon the hearing it was claimed that the collector should have ordered a reappraisement, and also that the appraisers took, erroneously, the market value of the iron at the time of exportation and not at the time of purchase. The court says that the protest did not comply with the requirements of the statute,

> Because it did not set forth distinctly and specifically the omission of the collector to order a reappraisement or that the appraisers valued the iron at

> the time of shipment and not at the time of purchase as grounds of objection to the payment of the duties imposed; and that therefore the plaintiffs were not now entitled to raise those objections.

Sadler vs. *Maxwell* (*Id.*, 134) turned upon the sufficiency of the protest. The court says that—

> The official appraisers add 100 per cent to the invoice and the merchant appraisers 400 per cent, and there is no evidence in the case affording reasonable ground for either valuation, but the court can only dispose of the matter upon the objections taken to the legal sufficiency of the protest, the protest being the foundation of plaintiff's right to avoid the appraisement and recover back the excess of duties levied. * * * The court can not regard objections to the proceedings of the collector made on the argument, however logically deduced from the averments in the protest, when the protest failed to lay them before the collector in terms unmistakably clear and precise.

In *Roller* vs. *Maxwell* (*Id.*, 142) the protest reads as follows:

> We hereby protest against the payment of 20 per cent penalty upon shawls contained in cases marked G. P. R. We claim that said shawls are invoiced at their fair market value in Vienna florins at 48½ the florin. We pay the excess of duty and penalty under protest, claiming to have the amount refunded.

The court held that the appraisal, not appealed from, was conclusive as to the dutiable value of the goods when the protest did not point out any violation of law in making the appraisement. (See also *Ponsot* v. *Maxwell*, 4 Blatchf., 43; and *Cummins* v. *Robertson*, 27 Fed. Rep., 654.)

Davies vs. *Arthur* (13 Blatchf., 34) involves an importation entered as "silk ties." The collector exacted a duty of 60 per cent ad valorem, upon the assumption that the goods should be classified as "silk scarfs." The importers protested on the ground that the merchandise was

> Articles worn by men, women, and children, and wearing apparel, and should only pay duty of 35 per centum ad valorem under section 22, act of March 2, 1861, and 13, act of July 14, 1862, and are neither scarfs nor ready-made clothing in fact, or as known in trade or commerce.

The court (Wallace, J.) says:

> It now appears that the merchandise should have been classified as a manufacture of silk not otherwise provided for under the concluding clause of section 8 of the act of June 30, 1864, and was dutiable at 50 per centum ad valorem. The plaintiffs seek to recover the difference of 10 per centum between the proper duty and the duty exacted by the defendant; and the only question for consideration is whether they are permitted to do so under their protest.

The court says:

> Although in one sense the articles imported may have been "silk ties" or "wearing apparel" or "articles worn by men," as claimed by the plaintiffs, or "silk scarfs," as claimed by defendant, they were not such within the meaning of the laws imposing duties, but were "a manufacture of silk not otherwise provided for," and the plaintiffs, therefore, fail to state the true ground of objection to the duty exacted. The office of the protest is to point out to the officers of the Government the precise errors of fact or of law which render the exaction of the

duty unauthorized (citing cases). The plaintiffs can only be heard to allege now the objections distinctly and specifically stated in their protest (citing cases). They are precluded, therefore, from considering that their importation was "a manufacture of silk not otherwise provided for," and subject to a duty of 50 per centum, instead of 60, as exacted, when, by their protest, they allege it to be "wearing apparel," subject to a duty of 35 per cent.

This case of *Davies* v. *Arthur* was brought before this court upon writ of error (96 U. S., 148).

The syllabus is as follows:

> An importer, having set forth in his written protest the ground of his objection to the payment of customs duties exacted by the collector, can not, in his suit against the latter, recover them upon any ground other than that so set forth.

The conclusion of the opinion (p. 153) is as follows:

> Three points were ruled by the circuit court: (1) That unless the protest set forth distinctly and specifically the ground of the objection to the amount claimed it fails to meet the requirement of the act of Congress. (2) That the office of the protest is to point out to the officers of the customs the precise errors of fact or of law which render the exaction of the duty unauthorized. (3) That the plaintiffs are precluded from insisting that their importation was a manufacture of silk not otherwise provided for, and subject to a duty of fifty per cent instead of sixty, when by their protest they allege it to be wearing apparel, &c., subject to a duty of thirty-five per cent.
>
> Satisfactory reasons in support of these conclusions are given by the circuit judge, to which it will be sufficient to refer without repetition.

Greeley's Administrator v. *Burgess*, decided in 1855 (18 How., 413), arose upon an importation of sugars.

> The protest is based "on the ground of fair valuation in the invoice, and that the goods were not fairly and faithfully examined by the appraisers."

This protest is held to be good, and the opinion by Mr. Justice Campbell says (p. 417):

> This, we think, was sufficient without disclosing the grounds upon which he contended that the appraisement was unfair or unfaithful.

In this case Mr. Chief Justice Taney dissents and says:

> Mr. Chief Justice TANEY: I dissent from the opinion of the court, being of opinion that the grounds of objection are not "distinctly and specifically" set forth in the protest, within the meaning of the act of Congress, and that the protest did not apprise the collector of the particular objection taken at the trial, and which could have easily been removed by another appraisement if it had been brought to the notice of the collector in the protest.
>
> Mr. Justice DANIEL and Mr. Justice NELSON concurred with the Chief Justice.

In the case of *Curtis' Administratrix* vs. *Fiedler*, decided in 1862 (2 Black, 461), the protest is held to be insufficient. The importation consisted of three packages, one of which consisted of hammered iron bars, and the other two of hemp in bundles.

The importation was made in 1842 and the retroactive effect of the enactment was invoked.

The entry embraced both the hemp and the iron, and the protest was written upon its margin, and was as follows:

> I hereby protest against the payment of the duty charged in this entry, on account that there exists no law authorizing the exaction of said duty.

The court held that in order to bring the importer within the provisions of the act he must have served a protest framed in accordance with the requirements of the act of 1845.

The opinion says (p. 480):

> No pretense is now made that the duty charged upon the iron was illegal or excessive, and the plaintiff concedes that the hemp was subject to a duty of 825 per ton. Irrespective of authorities, therefore, it is impossible to hold that the protest in this case is sufficiently distinct and specific to admit the objection to the payment set up at the trial. Numerous decisions have been made upon the subject, but there is not one of them that affords the slightest support to the position that the protest in this case constitutes a compliance with the requirement of the act of Congress. On the contrary, everyone of them affirms the rule that the importer must at least indicate in his protest distinctly and definitely the source or ground of his complaint, and his design to make it the foundation of a claim against the Government. *Greeley's Adm.* vs. *Burgess et al.* (18 How., 417); *Swanton* vs. *Morton* (1 Cur., C. C., 294); *Warren* vs. *Peaslee* (2 Cur., C. C., 235); *Thompson* vs. *Maxwell*, (2 Blatch. C. C., 391).
>
> Persons importing merchandise are required to make their protests distinct and specific, to apprise the collectors of the customs of the nature of the ob-

> jections made to the payment of the duties before it is too late to remove them or to modify the charge, and in order that the officers of the Government may know what they have to meet in case they decide to exact the duties, notwithstanding the objection, and expose the Government to the risk of litigation.

In *Nichols* v. *United States* (7 Wall., 126), which arose upon a case where no protest was made, the court says:

> The written protest, signed by the party, with the definite grounds of objection, were conditions precedent to the right to sue, and if omitted all right of action was gone. These conditions were necessary for the protection of the Government, as they informed the officers charged with the collection of the revenue from imports of the merchant's reasons for claiming exemptions and enabled the Treasury Department to judge of their soundness and to decide on the risk of taking the duties in the face of the objections.

B.

In considering cases that may be claimed to bear against the view of the defendants in error here, the case made upon the trial must be considered along with the protest. Were this protest before the court upon its own merits alone the question to be decided would be very different from that presented by the case now at bar. The protest may be said to suggest, in a certain degree, a ground of objection.

But the opening of plaintiff's counsel, limited and restricted as it is by the evidence introduced, destroys for all purposes of this review the ground that might be held to have been suggested by the terms of the protest.

Objection was made to the sufficiency of the protest in *Arthur* v. *Dodge* (101 U. S., 34). The question of that case was whether tin plates should be charged a duty of 15 per cent ad val. or 90 per cent of that rate.

The protest is against the payment of 15 per cent and claims "that under existing laws said goods are only liable to a duty of 90 per cent of 15 per cent or 13½ per cent, because," etc. The trial was in line with the protest. Under these circumstances the protest was necessarily sustained by the court.

The case of *Frazee* v. *Moffitt* (circuit court N. D. New York, 18 Fed. Rep., 584) arose upon an importation of hay. The hay was in bales and was charged a duty of 20 per cent as a manufactured article.

At that date there was no duty on hay by name, but there was a duty of 10 per centum ad valorem on all unenumerated raw or unmanufactured articles and 20 per cent on articles manufactured in whole or in part.

The principal contention was as to whether baled hay should be considered to be a manufactured or an unmanufactured article, but the sufficiency of the protest was challenged also.

> The protest was "against any greater rate of duties being charged upon hay shipped to or by us from Canada to the United States, entered with you or at the customs office at Rouse Point, than at the rate of 10 per centum ad valorem, for the reason and on the grounds that no higher rate than 10 per centum can lawfully or properly be charged on hay imported under the laws of the United States concerning duties on imports." There was also a notice that an appeal would be taken in case of an adverse decision (p. 585).

The court says:

> It is contended for the defendant that the protest in this case does not comply with the statute, in that, although it objects to paying more than 10 per cent, it states no ground except that no more than 10 per cent ought to be paid, and that it states only a conclusion of law, and leaves the defendant to find out as best he can why it is the law. But the protest was made in view of a liquidation of duties at 20 per cent, which is the "greater rate of duties" referred to in the protest. The liquidation at 20 per cent was under section 2516. No other provision of law than that section could possibly apply to hay. With section 2516 and the protest before him the collector could not fail to understand from the protest that the rate of 10 per cent claimed in it to be the proper duty was the *rata* of 10 per cent named in section 2516.
>
> A mere protest against the payment of the duty exacted is not a compliance with the statute. This protest is not a mere protest against the duty charged. It is a protest against that, with the further statement that only 10 per cent should have been charged on hay. Hay not being enumerated or provided for anywhere, if not in section 2516, and the 20 per cent and the 10 per cent being put in contrast both in the protest and in section 2516, and the collector having acted under section 2516 in imposing the 20 per cent, the language of the protest fairly referred the collector to the 10 per cent clause of section 2516.

In *Frazee* v. *Moffitt* there was nothing upon the trial to take the case away from the grounds suggested by the protest, but the evidence was in line with the protest, and

the whole case fell under section 2516 and the duties there charged upon contrasted articles.

The rule applied there does not touch the case at bar, where the goods are claimed in the protest to be "cotton gloves mixed with silk;" "cotton and silk, cotton chief part;" while the proceedings of the trial seek to classify and rate them as "gloves made on frames." In the hay case the collector could not fail to understand the ground of protest and the enactment referred to; in the other the importers abandon their protest grounds and go to new descriptive phraseology and to a different enactment.

In *Steegman* v. *Maxwell* (3 Blatchf., 365), commented upon in *Frazee* v. *Moffitt*, the importation was *thread laces* and *lawn laces*, composed of linen and cotton combined in the manufacture. They were a new article of commerce introduced after the tariff act of 1846.

The collector imposed a duty of 25 per cent upon the goods as "cotton laces, cotton insertings, cotton trimming laces, cotton laces and braids."

"Thread laces" was named in schedule E, which was a 20 per cent schedule.

The protest was "against the payment of 25 per cent duty charged on thread laces (or loom thread laces), claiming that said laces were liable to a duty of only 20 per cent." One protest read, "We hereby protest against being compelled to pay 25 per cent duty on thread lace and inserting because the article is so known commercially, and is provided for under schedule E of tariff of 1846, at a duty of 20 per cent." The court (Betts, J.) holds the protest to be adequately specific.

It is submitted that this decision is no authority in the case at bar, as it is here presented by the plaintiffs in error.

In *Arthur* v. *Morgan* (112 U. S., 495) it is held that a family carriage that had been used abroad by the importer more than a year should be treated as "household effects" of the owner.

The collector exacted 35 per cent upon the vehicle as an imported carriage.

The owner protested against paying this duty on the ground that the carriage was "personal effects," and had been used by her "over a year," and that she had shown that fact by affidavit, and that under section 2505 of the Revised Statutes "personal effects in actual use" were free from duty (p. 496).

The court holds the protest to be sufficient, saying (p. 501):

> This protest apprised the collector that the carriage was claimed to be free, under section 2505, as a carriage actually used abroad over a year. The "household effects" clause was in the mind of the party, and the collector could not fail to so understand.

As in the last preceding cases the proceedings of the trial and the evidence ran upon a direct line with the protest, and no enactment or charging paragraph other than the one pointed out by the protest was invoked.

There was no changing of position and no failure to specify the grounds to the collector. In the case now under review the ground relied upon at the trial was not one suggested by the protest.

CONCLUSION.

In view of the vagueness of the protest and of the restricting effect of the evidence given in limiting the issue to a single point, that point being one not suggested by anything set forth in the protest, it is respectfully urged that the protest is insufficient under the act of 1845 and the decisions, and that the judgment should be affirmed.

A. X. PARKER,
Assistant Attorney-General.